

No. 82-1224

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ALEXANDER L. STEVENS,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

KATV - CHANNEL 7,
Petitioner,

VS.

ELOISE THOMAS,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals improperly held that the ninety day period in which to file an action in Federal Court pursuant to Title VII of the 1964 Civil Rights Act does not begin to run from the time the charging party's attorney received the notice of right to sue unless it can be shown that the charging party specifically directed the EEOC to send the right to sue letter to the charging party's attorney?

2. Whether the Court of Appeals improperly held that receipt by an attorney's employee of a charging party's right to sue letter did not trigger the running of the statutory ninety day filing period pursuant to Title VII of the 1964 Civil Rights Act?

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STATEMENT OF THE CASE

This case presents questions concerning the proper application of the ninety-day filing period provided by 42 U.S.C. § 2000e-5(f)(1).

On June 27, 1980, respondent filed charges of race and sex discrimination with the Equal Employment Opportunity Commission (EEOC) against her employer, petitioner, KATV. On July 10, 1981, respondent made a written request for a right to sue letter. Moreover, while the testimony below was contradictory on this point, an EEOC supervisor testified that the respondent also indicated on this date that Mr. P.A. Hollingsworth

would be her representative. The EEOC Supervisor also testified that she confirmed Hollingsworth's representation of respondent by phone and that Mr. Hollingsworth requested that a copy of the right to sue letter be sent to him.¹

On July 14, 1981, the EEOC sent respondent a right to sue letter by certified mail, return receipt requested. A copy of the letter was also sent to Hollingsworth. On July 16, an employee of Mr. Hollingsworth signed a certified mail receipt for the letter, though Mr. Hollingsworth did not see the copy of respondent's right to sue letter until July 20, 1981. The respondent did not receive the right to sue letter until July 27.

Respondent's complaint was filed on October 23, 1981, eighty-eight days after she received her right to sue letter. Petitioner, KATV, moved to dismiss alleging that the complaint was untimely because it was filed ninety-nine days after *Hollingsworth* received a copy of respondent's right to sue letter.

Following a hearing on petitioner's motion the district court, relying on *Decker v. Anheuser Busch*, 632 F.2d 1221 (5th Cir. 1980)² found that an attorney-client relationship existed and dismissed the case. The Eighth Circuit reversed, holding there was "no evidence that appellant [respondent] requested that the right to sue letter be sent to Hollingsworth or that he personally acknowledged receipt." (Pet. App.)

¹ The Court of Appeals opinion observes that Mr. Hollingsworth denied confirming his representation or requesting a copy of the right to sue letter. (See *Thomas v. KATV, Channel 7*, No. 82-1265 Slip Opinion, 2) (Petitioner's Appendix, hereinafter Pet. App.)

² The Fifth Circuit subsequently granted rehearing en banc in *Decker*, vacated the panel decision and remanded the case for a further evidentiary hearing as to the scope and duration of the alleged attorney-clerk relationship. 670 F.2d 506 (5th Cir. 1982) (banc).

ARGUMENT: REASONS FOR DENYING THE WRIT

I.

The Decision Of The Eighth Circuit Is Consistent With Supreme Court Decisions And There Is No Conflict Among The Circuits.

While this Court has not specifically addressed the question of the proper application of the ninety-day filing period of 42 U.S.C. § 2000e-5(f)(1) those Courts of Appeals which have considered the issue have uniformly addressed their inquiry to questions concerning the scope and extent of the attorney-client relationship between the Title VII claimant and his/her attorney and the authorization, if any, for the attorney to receive and open mail on the claimant's behalf. *Decker v. Anheuser-Busch*, 670 F.2d 506, 507 (5th Cir. 1982) (en banc).¹

As such, the decision of the Court of Appeals below, is perfectly consistent with the decisions of the Ninth and Seventh Circuits which have also considered this issue. In *Gonzalez v. Stanford Applied Engineering*, 597 F.2d 1298, 1299 (9th Cir. 1979), the Ninth Circuit held that,

[w]hen the request for issuance of a right to sue letter comes from a claimant's attorney, notice to the attorney that right to sue has been granted starts the time running.

In *Minor v. Lakeview Hospital*, 421 F. Supp. 485, 486 affirmed without opinion, 582 F.2d 1284 (7th Cir. 1978) the Seventh Circuit adopted essentially the same view. There, the attorney sent notice to the EEOC that he had been retained and requested that "all future correspondence" to his client be served directly upon him, and he specifically requested that the commission issue a notice of right to sue.

¹ See, e.g. *Jones v. Golden Gate Equipment Company*, ____ F. Supp. ____, 25 EPD ¶ 31,574, 24 FEP Cases 1252 (N.D. Cal. 1980).

The legal underpinning for all these cases is that unless there is some clear indication that the claimant desires that the attorney receive the right to sue notification, the statute ought to operate literally, and the 90-day limitation ought not to begin running until the notice is received by the claimant. In both *Gonzalez* and *Minor* the attorney-client relationship was one of long standing before the Commission, and indeed in those cases, the attorneys themselves made the request for the right to sue letter.

The Eighth Circuit rule, is plainly geared to provide similar protection for those the statute is designed to protect. The Eighth Circuit's opinion, relying on *Craig v. Department of HEW*, 581 F.2d 189 (8th Cir. 1978), seeks to protect the claimant and ensure that there is a legitimate attorney-client relationship before the attorney is authorized to receive the notice of right to sue. In effect then, the Eighth Circuit rule operates in the same fashion as the rules from the Seventh and Ninth Circuit in that they are all protective of the claimant and require a substantial attorney-client relationship before the institution of the lawsuit is taken from the hands of the claimant.

II.

The Eighth Circuit's Decision Is Correct

The facts of this case do not demonstrate such an attorney-client relationship as would have withstood the test of *Gonzalez*, *Minor* or *Decker*. Here the claimant (respondent) specifically requested that the notification of right to sue be sent to her. And while there is disputed testimony as to whether or not Hollingsworth requested a copy of the right to sue,⁴ unlike

⁴ It is noteworthy that Hollingsworth is claimed to have made this request by phone pursuant to a contact initiated by the EEOC. However, the EEOC regulations require that the request for a notice of right to sue be made in writing. 29 C.F.R. § 1601.28 and the claimant Ms. Thomas made such a written request that the notice be sent to her.

the situations in *Gonzalez* and *Minor*, Hollingsworth did not initiate the request for the right to sue, had no prior dealings with the EEOC involving the respondent prior to her request for the right to sue, and made no request that he rather than respondent receive communications from the EEOC.

Contrary to the assertions of the petitioner, the Eighth Circuit's opinion does not sound the death knell for constructive notice under 42 U.S.C. § 2000(e)-5(f)(1). Rather, in harmony with the decisions of the Fifth, Seventh and Ninth Circuits, the Eighth Circuit has merely more precisely defined the circumstances under which such constructive notice may more properly attach. Recognizing Title VII as a remedial statute each of the circuits has attempted to resolve ambiguities in the statute such as these, "in favor of those whom the legislation was designed to protect." *Craig*, 581 F.2d at 192.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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